Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	

NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCATION INITIAL COMMENTS

The National Telecommunications Cooperative Association (NTCA)[1] submits its comments in response the Federal Communications Commission's (Commission's or FCC's) Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding.[2]

I. INTRODUCTION AND SUMMARY

On July 31, 2001, the United States Court of Appeals for the 10th Circuit remanded portions of the Commission's *Ninth Report and Order,* [3] that established a federal high-cost universal support mechanism for non-rural carriers based on forward-looking economic costs (FLEC). Although the Court upheld the Commission's adoption of the FLEC model, it determined that the FCC did not provide an adequate explanation as to how the FLEC mechanism would achieve the statutory principles codified in section 254 of the Act. Specifically, the Court concluded that the Commission did not: (1) define

[1] NTCA is a non-profit corporation established in 1954 and represents 545 rate-of-return regulated rural telecommunications companies. NTCA members are full service telecommunications carriers providing local, wireless, cable, Internet, satellite and long distance services to their communities. All NTCA members are small carriers that are defined as "rural telephone companies" in the Communications Act of 1934, as amended (Act). They are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

[2] *In the Matter of the Federal-State Joint Board on Universal Service,* CC Docket 96-45, FCC 02-41, Notice of Propose Rulemaking and Order, (rel. Feb. 15, 2001).

[3] *Qwest v. FCC,* 258 F.3rd 1191 (10th Cir. 2001); *In the Matter of the Federal-State Joint Board on Universal Service,* Ninth Report & Order, and Eighteenth Order on Reconsideration, 14 FCC Rcd. 20432 (1999)(*Ninth Report and Order*)(The non-rural FLEC mechanism determines the amount of federal support

and apply adequately the key statutory terms of "reasonably comparable" and "sufficient"; (2) explain sufficiently how it established the funding benchmark at 135 percent of the national average; (3) provide inducements for state universal service mechanisms; (4) explain how the FLEC funding mechanism will interact with other universal-service programs.

NTCA's interest in this proceeding is based on its concern that certain decisions in this proceeding may directly affect the calculation of universal service support for rural telephone companies or hinder the rights of rate-of-return carriers to recover costs properly allocated to the interstate jurisdiction.

NTCA therefore recommends the Commission consider the following factors when developing a new definition of the term "reasonably comparable" rates and services in urban and rural areas: (1) the rates for all services supported by universal service support; (2) the basic rates for local calling plans in urban and rural areas; (3) the scope of services included in the basic local calling plans; and (4) the relevant community of interest within the local calling area, including toll charges incurred to contact essential local public service institutions outside a rural local calling area. In addition, the terms and conditions for receiving support should be consistent with the use requirement of section 254(e) of the Act and universal service support should not be used to artificially create competition.

NTCA also recommends that the term "rural" for rural incumbent local exchange carriers (RILECs) should be defined as any study area served by a "rural telephone

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to be provided to each state by comparing the statewide average cost per-line for non-rural carriers to a nationwide benchmark).

company" as described in section 3(37) of the Act.[4] When evaluating potential inducements for states to establish state universal service mechanisms, the Commission should very carefully consider the rights of rate-of-return carriers to recover costs properly allocated to the interstate jurisdiction. If the Commission decides to condition the receipt of federal universal service support on the development of state universal service programs, it should not deprive carriers of their right to recover the cost of their investments. Inducements should not create mandates on states that would interfere with a state's jurisdiction over intrastate rates and services. The Commission's actions in this proceeding should take into consideration state commission jurisdiction and the separation of carrier property and expenses between interstate and intrastate operations. This is necessary in order to avoid issues of preemption and confiscation when deciding on various types of state inducements to assist in achieving the goals of universal service.

II. REDEFINING REASONABLY COMPARABLE

The Commission previously defined *reasonably comparable* as "a fair range of urban and rural rates both within a state's borders, and among the states nationwide." The Commission defined a *fair range* of rates to mean "that support levels must be sufficient to prevent pressure from high costs and the development of competition from causing unreasonable rates above current affordable levels." In the *Ninth Report and Order,* the Commission determined that "reasonably comparable must mean some reasonable level above the national average FLEC cost per line, i.e., greater than 100 percent of the national average." The Court, however, rejected these definitions because

[4] 47 U.S.C. §153(37).

it did not find them to be reasonable interpretations of the statutory language, which calls for reasonable comparability between rural and urban rates.

To redefine the term reasonably comparable, NTCA recommends the Commission actively work with the Federal-State Joint Board on Universal Service. Comparability should be defined from the perspective of the individual subscriber. The concept is simple, but there are many pitfalls to achieving the comparability goals of section 254(b) of the Act. Avoiding these pitfalls requires reaching broad agreement on a rational systematic approach to be followed by both federal and state regulatory authorities. There are large disparities in costs to serve customers. There are also large differences in rates paid for the various universal services.

Today, this country does not have a fair and equitable way to reconcile differences in rates for basic local calling services. In some instances, rural companies have low local basic service rates, but they also have small local calling areas and subscribers often cannot reach key parts of their local community infrastructure without paying for a long distance call. Is it reasonable for a rural subscriber to place a toll call to reach the nearest hospital, the local public school, local government agencies, the nearest pharmacy, or even the nearest auto-mechanic? Certainly, the larger picture must be considered when defining comparability. It is not enough to deal with local service without also dealing with intrastate and interstate toll services. Direct one-to-one comparisons of rural and urban rates are difficult. The matter needs to be approached with the utmost care to ensure that rural subscribers receive comparable services at comparable prices as set forth in section 254(b)(3).

The size of a customer's local calling area and community of interest contained in the local calling area should also be considered as part of the equation for assessing reasonably comparable rates and services. The range of a customer's calling area can significantly impact the affordability and comparability of basic local rate plans. The pertinent community of interest within the local calling area should be the same for both rural and urban consumers, and should include schools, libraries, health care providers, fire, police and emergency services, government offices, and other essential public services. Alternative approaches, such as using universal service to pay for foreign exchange lines or toll-free 800 numbers may be attractive options to expanding local calling areas.

NTCA strongly supports the universal service program. It is an integral part of the revenue stream for independent RILECs. Thanks to previous universal service support, government loan programs, separations policies and the averaging of long distance costs, this nation has made quality affordable telephone service available to all. This is an outstanding success. It is an example of successful government policy. The United States is setting an example for the rest of the world of how to most effectively bring service to high cost rural areas. Now, through the Telecommunications Act of 1996, this nation strives to realize a higher degree of comparability and fairness: achieving a degree of comparability that includes not only universal availability of service, but also comparable rates. While the pursuit of this goal is laudable, it is also fraught with peril.

Independent, community-based RILECs serve their communities well. They have an excellent reputation for high-quality and affordable service. They continue to invest in

their network infrastructure. Many are deploying DSL technology to offer high-speed access to the Internet.[5] Most of these companies are dependent upon universal service support to offer comparable services at comparable rates. Assuring independent rural carriers that sufficient support will continue to be available is an extremely important part of reforming rate structures and realizing consumer price comparability. The Commission and the universal service joint board should therefore find a way to allow RILECs to charge their customers rates comparable to what is charged in urban areas and to receive sufficient universal service funds to fulfill their rate-of-return revenue requirement. Anything less will mean a gradual deterioration of existing services and the creation of an ever-widening gap in the availability of advanced services between rural and urban areas.

There is no easy way to achieve rate comparability or to redefine reasonably comparable. It is a matter of policy and determination. The social, geographic and economic hurdles are high. NTCA therefore recommends that the following factors to be taken into the FCC's consideration of redefining of reasonably comparable rates and services in rural and urban areas: (1) the rates for all services supported by universal service support; (2) the basic rates for local calling plans in urban and rural areas; (3) the scope of services in the local calling plans; and (4) the relevant community of interest within the local calling area, including toll charges incurred to contact essential local public service institutions outside the local calling area. Also, the terms and conditions for receiving support should be consistent with the purposes of universal service and should not be used to artificially create competition.

[5] See NTCA 2001 Internet/Broadband Availability Survey Report, December 2001 at

III. THE TERM "RURAL" SHOULD BE DEFINED AS A RURAL TELEPHONE COMPANY'S STUDY AREA

The Commission also seeks comment on how to define the word "rural" for purposes of comparing rates in rural, insular and high-cost areas to rates in urban areas to determine reasonably comparable.[6] For purposes of comparing rural rates provided by RILECs to urban rates provided by non-RILECs, NTCA recommends that the term rural should be defined as any study area served by a "rural telephone company" as described in section 3(37) of the Act.[7] This definition includes RILECs providing telephone exchange service, including exchange access, to any study area with fewer than 50,000 access lines, RILECs providing telephone exchange service to any study area with less than 100,000 access lines, or RILECs providing exchange service to less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996. This definition also encompasses RILECs study areas currently receiving high-cost universal service support under the Commission's rural modified embedded cost mechanism. This definition would be appropriate because section 3(37) carriers are clearly providing service to rural and high-cost study areas in the United States.

IV. THE DEFINITION OF "SUFFICIENT" SUPPORT WILL DEPEND PARTIALLY ON THE REDEFINITION OF REASONABLY COMPARABLE

The Act requires the Commission to establish "specific, predictable, and sufficient mechanisms" to preserve and advance universal service.[8] Sufficient universal service

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http://www.ntca.org/leg_reg/white/2001bb_survey.pdf .

[6] NPRM at ¶16.

[7] 47 U.S.C. §153(37).

[8] 47 U.S.C. § 254(d).

support mechanisms would logically require enough universal service support to achieve reasonably comparable rates in rural and urban areas throughout the United States. The definition of the term "sufficient" therefore depends at least partially on how the Commission will redefine the term reasonably comparable. Once the Commission redefines reasonably comparable in a way that is consistent with section 254(b)(3), the definition of sufficient will then have to comply with that new definition.

Given the high degree of variability in costs among RILEC's, there must be enough support for each rural study area. These are small companies. Targeting support to each individual study area is necessary to provide each company with the opportunity to recover its full revenue requirement. This level of support is needed to assure comparability now and in the future. It is also needed for the RILEC to satisfy all its obligations including equal access, number portability, carrier of last resort obligations and others. Anything less will lead to a degradation of service and a lack of comparability in services and rates.

V. STATE INDUCEMENTS SHOULD NOT INTERFERE WITH CARRIERS' ABILITY TO RECOVER COSTS

The Court has determined that the Commission must develop mechanisms to induce state action to preserve and advance universal service.[9] Although the Court recognizes that the Commission does not have jurisdiction over intrastate service, the Court found it appropriate and necessary for the FCC to rely on state action to support the cost of universal service.[10] The Court therefore required the Commission to create inducements for states to assist in achieving the goals of universal service. The Court

[9] *Qwest v. FCC,* 258 F.3d at 1203.
[10] *Id.,* at 1204.

suggested the FCC consider possible ways to induce state action, such as: (1) condition a state's receipt of federal universal service funds on the development of an adequate state universal service program; (2) create a binding cooperative agreement with the states; (3) establish a state share requirement; or (4) develop some other form of state inducement.

In evaluating potential state inducements, NTCA recommends that the Commission consider rate-of-return carriers' right to recover properly allocated costs to the interstate jurisdiction, such as interstate common line support (ICLS). This support is tied to the revenue requirements of all rate-of-return RILECs subject to the Commission's MAG Order and should not be held hostage to some future state action. If the Commission decides to condition the receipt of federal universal service support on the development of state universal service programs, it should not deprive carriers of their right to recover their investments. State inducements also should not impose mandates on states that would interfere with their jurisdiction over the intrastate rates and services. The United States Court of Appeals for 5th Circuit has specifically determined that the Commission is prohibited under section 2(b) of the Act from regulating intrastate services.[11]

In addition, the Supreme Court stated in *Smith v. Illinois*, that "proper regulation of rates can be had only by maintaining the limits of state and federal jurisdiction" to determine whether rates would result in confiscation.[12] The Court held that when distinct jurisdictional limits exist as to the determination of reasonable rates, some form of jurisdictional separations must occur. The Court established that "reasonable measures [are] essential" and indicated that such measures should not "ignore altogether the actual

[11] *Texas Office of Public Utility Counsel v. FCC,*183 F.3d 393, 448 (5th Cir. 1999).

uses to which the property is put."[13] The Commission's actions in this proceeding therefore should take into consideration state commission jurisdiction and the separation of carrier property and expenses between interstate and intrastate operations in order to avoid issues of preemption and confiscation when deciding on various types of potential state inducements to achieve the goals of universal service.

VI. CONCLUSION

When addressing the issues raised by the Court concerning the redefinition and application of the key statutory terms of reasonably comparable, rural and sufficient, and deciding on proper inducements for states to establish universal service mechanisms, the Commission should consider NTCA's above-recommendations to ensure that decisions in this proceeding do not adversely affect the calculation of universal service support for RILECs or their right to recover costs properly allocated to the interstate jurisdiction.

Respectfully submitted,

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[12] *Id.*
[13] *Id.*

CERTIFICATE OF SERVICE

I, Rita H. Bolden, certify that a copy of the foregoing Initial Comments of the National Telecommunications Cooperative Association in CC Docket No. 96-45, FCC 02-41 was served on this 10th of April 2002 by first-class, U.S. Mail, postage prepaid, to the following persons:

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